

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
APFM COMMUNICATIONS, INC.	:	DETERMINATION
	:	DTA NO. 812309
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1987	:	
through August 31, 1990.	:	

Petitioner, APFM Communications, Inc., 331 West 57th Street, Suite 201, New York, New York 10019, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1987 through August 31, 1990.

On April 21, 1994 and August 24, 1994, respectively, petitioner appearing by David O. Klein, Esq., and the Division of Taxation appearing by William F. Collins, Esq. (Robert Tompkins, Esq., of counsel) consented to have the controversy determined on submission without hearing. On October 7, 1994, the Division of Taxation submitted documentary evidence. On October 18, 1994, the parties submitted a stipulation of facts. On November 11, 1994, petitioner submitted documentary evidence and its brief. The Division of Taxation submitted its brief on December 16, 1994. Petitioner submitted its reply brief on January 5, 1995. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly assessed petitioner on amounts wrongfully collected as sales tax on the sale of a nontaxable service.

FINDINGS OF FACT

Petitioner, APFM Communications, Inc., was incorporated in the State of Delaware on December 22, 1989. From January 1, 1990 through August 31, 1990, petitioner was located at

331 West 57th Street, New York, New York 10019. During this period, petitioner operated a telephone information and entertainment service over New York Telephone's network.

More specifically, petitioner subscribed to a New York Telephone Interactive Information Network Service ("IINS") through which individual telephone users, by calling a designated number, obtained a subscriber-provided pre-recorded announcement or interactive program. In petitioner's case, individual telephone users' calls were bridged into other calls via a program provided by petitioner. The service provided by petitioner is also known as a "party line".

Petitioner entered into a contract with New York Telephone with respect to the service described above. Pursuant to the contract, New York Telephone billed customers for calls made to petitioner's service and remitted to petitioner a portion of the proceeds collected by New York Telephone on those calls.

Also pursuant to the contract, New York Telephone charged and collected sales tax on calls made to petitioner's service. New York Telephone paid such amounts collected as sales tax on such calls over to petitioner.

Section 12 of the contract entered into between petitioner and New York Telephone¹ provided as follows:

"§ 12. Application of Taxes

"a. Billing of Taxes

"Upon execution of the Agreement, Subscriber [petitioner herein] shall provide to New York Telephone (i) appropriate federal, state and local Taxpayer Identification numbers and (ii) a properly completed New York State and Local Sales and Use Tax Resale Certificate. Subscriber is solely responsible for the determination of its applicable federal, state or local income, sales, use, excise, gross receipts or other taxes or surcharges (collectively 'Taxes') imposed on telephone users with respect to IINS. New York Telephone agrees and will attempt

¹The actual contract between petitioner and New York Telephone was not entered into evidence herein. A standard form agreement used by New York Telephone and IINS information providers in or about July 1990 was entered into evidence. In the absence of any objection or evidence to the contrary, it is concluded that the provision of the standard form contract quoted above was contained in the contract entered into by petitioner and New York Telephone.

to have Participating ICOs agree, to bill and collect, on behalf of Subscriber, and to remit to Subscriber, certain Taxes, as hereinafter provided. With respect to New York State (including any localities, where applicable) sales tax, Subscriber hereby directs New York Telephone . . . to bill telephone users, on Subscriber's behalf, the applicable sales tax. Subscriber hereby releases New York Telephone . . . from any and all liability arising out of their imposition, computation and collection of any Taxes imposed on telephone users. Subscriber will advise New York Telephone in writing of any tax procedures with respect to application, billing, recording and collection of Taxes, including any changes in the law affecting the taxability of such services.

"b. Filing of Tax Returns

"Subscriber shall file all applicable returns for Taxes imposed on telephone users or with respect to IINS, and shall pay or remit all such Taxes and other items and any applicable interest, penalties or other charges or surcharges to the appropriate taxing authorities." (Emphasis added.)

With respect to the period January 1, 1990 through August 31, 1990, New York Telephone reported to petitioner that it billed \$8,515.99 in New York State sales tax to New York customers of petitioner's telephone information service and remitted such amounts collected as tax to petitioner.

Petitioner did not file any sales tax returns with respect to the period January 1, 1990 through August 31, 1990. Petitioner was not registered as a vendor for New York State sales tax purposes during this period. New York Telephone was such a registered vendor during this period.

On October 27, 1992, the Division of Taxation ("Division") issued to petitioner a Notice of Determination which assessed a total of \$48,013.44 in sales tax due, plus penalty and interest, for the period September 1, 1987 through August 31, 1990. The notice advised that the tax assessed therein had been estimated.

By Conciliation Order dated September 3, 1993, the Notice of Determination was revised and the tax assessment adjusted downward to \$8,515.99, plus penalty and interest. The recomputation reflects the actual amounts collected as sales tax by New York Telephone and paid over to petitioner during the period January 1, 1990 through August 31, 1991.

CONCLUSIONS OF LAW

A. On September 1, 1990, Tax Law § 1105(c)(9) went into effect (see, L 1990, ch 190,

§ 174). This provision imposed sales tax on receipts from certain telephone information or entertainment services. The service provided by petitioner as described herein is subject to sales tax under this section. Prior to September 1, 1990, the receipts from such telephone information or entertainment services were not subject to sales tax. Accordingly, as conceded by both parties, the tax collected by New York Telephone was erroneously collected because the sales tax on telephone information service providers was not imposed by statute until after the period at issue.

B. Tax Law § 1137(a)(iii) provides, in relevant part:

"Every person required to file a return under the preceding section . . . shall, at the time of filing such return, pay to the tax commission . . .

* * *

"(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax"

Tax Law § 1136(a), referenced above in section 1137, provides, in relevant part, that "[e]very person required to register with the tax commission as provided in section eleven hundred thirty-four . . . shall . . . file a return . . . with the tax commission."

Tax Law § 1134(a)(1)(i) states that "[e]very person required to collect any tax imposed by this article . . . shall file with the commissioner of taxation and finance a certificate of registration"

Tax Law § 1131(1) defines "person required to collect any tax imposed by this article" as including "every vendor of tangible personal property or services"

Tax Law § 1101(b)(8)(i) defines "vendor" as including, inter alia, "[a] person making sales of tangible personal property or services, the receipts from which are taxed by this article" (emphasis added).

C. Working through this statutory scheme reveals that wrongfully collected sales tax must be reported and paid over to the Division by persons required to file sales tax returns. Insofar as is relevant herein, persons required to file returns are vendors, while vendors are persons who make sales of taxable services.

D. Applying this law to the facts, it is noted that since the service sold by petitioner was not subject to sales tax during the period at issue, petitioner was not a vendor within the meaning of Tax Law § 1101(b)(8)(i). Since petitioner was not a vendor, it follows that petitioner was not required to collect tax, register or file a sales tax return. It further follows, therefore, that petitioner was not required to pay over to the Division amounts wrongfully collected as sales tax pursuant to Tax Law § 1137(a)(iii).

E. On brief, the Division referred to petitioner as a vendor. The Division did not, however, offer any explanation or rationale for its conclusion that petitioner was such a person. If petitioner could be considered a vendor under any theory other than that discussed above (and it does not appear that it could), the Division should have offered such a theory.

F. Also on brief, the Division asserted that New York Telephone was an agent of petitioner. Petitioner argued that no such agency relationship existed. Contrary to petitioner's contention, the record establishes that New York Telephone billed and collected sales tax at petitioner's direction and on petitioner's behalf (see, Finding of Fact "5"). The Division, however, has not offered an argument as to how this fact relates to petitioner's asserted vendor status. Certainly, the fact that New York Telephone, a vendor, was acting on petitioner's behalf does not transform petitioner into a vendor and, as discussed, absent a finding that petitioner was such a person, there is no liability to petitioner under Article 28.

G. Finally, it is worth noting that the only issue over which the Division of Tax Appeals has authority in this matter is the validity of the Division's assessment. Thus, while the record establishes that petitioner received money to which it was not entitled, the only question at issue is whether the Division may recover such money under Article 28 of the Tax Law. As discussed above, it may not.

H. The petition of APFM Communications, Inc. is granted and the Notice of Determination dated October 27, 1992, as modified by the Conciliation Order dated September 3, 1993 (see, Finding of Fact "9"), is cancelled.

DATED: Troy, New York
May 18, 1995

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE